Offshore Marine Service Association

Claim and Response:

OMSA Stands with CBP in Defending the American Mariner

The Jones Act is grounded in a national defense policy of ensuring domestic shipbuilding and seafaring capacity while supporting a strong domestic maritime industry essential for U.S. economic security and job creation. It is the law of the land and has been supported by every modern president. It is, and always has been, an effective "Buy American, Hire American" statute.

Customs Border Patrol (CBP) announced on January 18, 2017 a notice (the 2017 Notice) of revocation and modification of previously issued Jones Act letter rulings that granted unlawful exemptions for the use of foreign vessels and foreign labor to operate on the Outer-Continental Shelf (OCS) region, in direct violation of the Jones Act. Since 2009, CBP has been working to rectify this issue. Foreign interests, at the expense of U.S. workers, shipyards, and ship owners, have attempted to stall and delay this proper enforcement of U.S. law, citing numerous false claims and inaccuracies.

Further delay of the revocation of these letter rulings will only hurt American ship owners, mariners and shipbuilders. These delays, including the incorrect consideration of moving the revocation process to a regulation, will only benefit foreign vessels, foreign shipbuilders, and foreign vessel crews who will be allowed to continue to operate in the U.S.--contrary to U.S. law.

OMSA, the voice of the domestic offshore marine transportation service industry, seeks to set the record straight on false claims put forth by foreign interests and Jones Act opponents who have continued to seek to contort the proper enforcement of U.S. law for the sole benefit of foreign shipbuilders and operators. Specifically, the following claims are responded to (cltr+click on each claim for a hyperlink to the discussion):

CLAIM: The 2017 Notice issued by Customs Border Patrol is "rushed."

CLAIM: The domestic maritime industry and vessels cannot support the necessary work.

CLAIM: The Notice is not the correct process to follow.

CLAIM: The Notice will disrupt offshore drilling activities.

CLAIM: The 2017 Notice will prevent pipe-laying operations.

CLAIM: The 2017 Notice will prevent heavy-lift operations

CLAIM: The CBP Notice is proposing new regulations and is a major policy change that should require Administrative Procedures Act rulemaking.

CLAIM: The use of Jones Act qualified vessels is a safety concern for workers operating on the Outer-Continental Shelf (OCS).

1. **CLAIM:** The 2017 Notice issued by Customs Border Patrol is "rushed."

RESPONSE: The accusation that CBP is acting in a rushed manner ignores the reality that this process has been ongoing since 2009. In fact, it has been delayed since 2009 at the request of the very same interests that are now saying the process is "rushed." Let's set the record straight.

In 2009, CBP recognized that for decades it had issued flawed interpretations of the Jones Act as it applies to subsea operations that occur on the United States Outer-Continental Shelf ("OCS"), which U.S. law considers to be a U.S. "point" covered by the Jones Act. CBP issued a notice of revocation of several letter rulings (the 2009 Notice). That process drew 128 comments, both in favor and opposition to the CBP action. Uniformly, the opponents argued that CBP was acting hastily and needed to take more time to consider its proposal. Later that year, CBP withdrew the notice and stated a "new notice which will set forth CBP's proposed action relating to the interpretation of T.D. 78-387 and TD 49815(4) will be published in the Customs Bulletin in the near future." The near future arrived on January 18, 2017. Eight years of deliberation brought CBP back to the same, inevitable conclusion that it reached in 2009. The Jones Act letter rulings are legally incorrect and need to be revoked. Time will not alter that reality.

2. **CLAIM:** The domestic maritime industry and vessels cannot support the necessary work.

RESPONSE: Following the 2009 Notice, U.S. companies invested more than $2 billion to ensure that offshore oil and gas exploration and production would not be affected by proper enforcement of the Jones Act. As a result, 31 vessels have been built to perform the kind of work that CBP sought to address in 2009 and is now addressing in its most recent notice. That work is predominantly subsea construction and inspection, repair and maintenance (IRM) activities performed by light and medium subsea construction vessels. According to the IHS Petrodata Construction Vessel database, there were on average 19.8 light and medium subsea construction/IMR vessels working in the Gulf Coast region over the past 5 years. With 31 such vessels, U.S. companies are ready to perform the activities dominated by foreign vessels for the past several decades.

3. **CLAIM:** The Notice is not the correct process to follow.

RESPONSE: To modify or revoke a CBP letter ruling, Congress, requires CBP to follow a specific and unique process. The statute, 19 U.S.C. Section 1625(c), was specifically enacted for the purpose of modifying or revoking CBP letter rulings. The 1625(c) process begins with a notice issued in the *Customs Bulletin* of intention to revoke or modify an existing letter ruling. What follows is a minimum 30-day opportunity for public comment, followed by a maximum 30-day consideration period before a final decision is published in the *Customs Bulletin*. The decision then becomes effective 60-days after publication.

Following this statutory procedure, on January 18, 2017, CBP issued its notice to modify or revoke unlawful letter rulings. An extension of 60-days for the comment period was issued following the new Administration's general guidance for pending matters. The open comment period will close April 18, 2017, allowing three times the minimum statutorily defined period for public comment.

It is noteworthy that no due process was given to the U.S. maritime community when CBP issued its erroneous letter rulings. These letters were issued as a response given by CBP to private inquiries. They were not published in the *Customs Bulletin* nor was there any opportunity for U.S. ship owners, mariners or shipyards to weigh in with their views. Consequently, the 1625(c) process has provided foreign interests that oppose modification and revocation far more due process than U.S. interests received.

4. **CLAIM:** The 2017 Notice will negatively impact the economy, drive up cost, and hurt the oil and gas industry.

RESPONSE: This ruling will not impede offshore energy exploration or production because of recent investments by U.S. companies. U.S. vessels have both the capacity and capability to perform the work required given the surplus of vessels immediately available to meet the demand. This in turn will keep costs fair and competitive for the oil and gas industry while employing fair-waged mariners and U.S. companies that abide by the U.S. tax code.

Letter rulings from the past three decades have put foreign companies first and American companies last. With the influx of cheap and foreign labor, U.S. companies have been forced to compete on an uneven playing field, stifling job growth and economic security.

Implementation of CBP's revocation and modification will fuel American jobs and the American economy, creating over 3,200 new jobs, increasing wages for workers in the Gulf Coast region by over $155 million, and generating over $700 million in regional economic output.

5. **CLAIM:** The Notice will disrupt offshore drilling activities.

RESPONSE: The CBP Notice does not directly address the activities of drilling vessels. Moreover, OMSA has raised no objection to CBP concerning the manner in which drilling operations occur from a Jones Act compliance point of view given the proper use of Jones Act qualified supply vessels to transport equipment and materials to and from drilling vessels. There is no coastwise law that prohibits a foreign flag vessel from drilling a well or prohibit a drilling vessel moving from one drilling location to another, while laden with drilling equipment. While the Notice revokes letters that ruled chemicals, cement and other such materials are not vessel equipment that is not new. Jones Act supply vessels have always brought such items to and from drilling vessels precisely because they are commonly understood to be merchandise and not part of the vessel's equipment. Any other view would have long ago obviated the need for a Jones Act supply boat industry.

6. **CLAIM:** The 2017 Notice will prevent pipe-laying operations.

RESPONSE: While the 2017 Notice makes important changes to interpretations affecting the work of subsea construction/IMR vessels, the Notice does not change existing CBP interpretations concerning the "paid out, not unladen" theory that currently allow foreign vessels to perform pipe and umbilical laying activities. Under this theory, it is CBP's view that because a pipeline, umbilical or cable is "paid-out" (or installed in a continuous manner while the vessel continues to move forward), the vessel's activities do not constitute the transportation of merchandise between coastwise points. The Jones Act community disagrees with this theory.

The 2017 Notice does say—correctly—that pipelines, subsea cables and subsea umbilicals installed on the seafloor are not vessel equipment. That view should not be controversial. A pipeline, cable or umbilical installed on the seafloor is not part of the vessel.

7. **CLAIM:** The 2017 Notice will prevent heavy-lift operations

RESPONSE: None of the rulings sought to be revoked or modified deal with heavy-lift operations. Heavy-lift vessels are utilized to set platform jackets (bases) and top sides at an offshore installation site. During a lifting operation, a Jones Act qualified launch barge, or a foreign flag launch barge (operating under a waiver provided in statute) is used to transport the jacket or top side to the installation location.

CBP has held repeatedly, and most recently in 2012, that while a heavy-lift vessel may install a platform jacket, it may not engage in any part, however minimal, of the transportation of the jacket. In the Notice, CBP does not retreat from this view. OMSA and other members of the Jones Act community have offered a statutory solution to address the flexibility desired by heavy lift vessel operators to move as part of their installation activity. This proposal provides a Jones Act compliant solution by providing a formal statutory waiver for such activities as opposed to CBP created rationales that are inconsistent with the statute.

8. **CLAIM:** The CBP Notice is proposing new regulations and is a major policy change that should require Administrative Procedures Act rulemaking.

RESPONSE: The letter rulings under consideration are not law, regulations or even policy. Rather they are simply CBP responses to private letters seeking an interpretation of the Jones Act. Letter rulings are issued in an opaque and private manner between the requesting party and CBP. The outcomes sought by those requesting letter rulings are always erosive to the Jones Act. CBP issued its responses to these requests without any public comment or consideration of the impact to the U.S. marine community of the interpretation that was sought. The victims of this practice were U.S. mariners, shipyard workers, shipyards and ship-owners who were given no opportunity to weigh in on what CBP has now, for the second time, admitted were legally flawed conclusions.

The Administrative Procedure Act (APA), does not impose any requirement on CBP to engage in a rulemaking before revoking a letter ruling. The APA does not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." The Supreme Court has specifically considered CBP letter rulings, and held that they "are best treated like interpretations contained in policy statements, agency manuals, and enforcement guidelines." These letter rulings did not go through a rulemaking – or any notice and comment process - when issued. Imposing rulemaking requirements to revoke them - particularly when Congress has specified the Section 1625(c) process described earlier, would be arbitrary and capricious. In practice, it would create a process that "locks in" erroneous letter rulings - making them easy to issue, but exceedingly difficult and expensive to revoke.

CBP is abiding by the law by following the Section 1625(c) process. The motive of foreign interests calling for a formal rulemaking prior to revocation is transparent. Their effort to "lock in" these admittedly erroneous interpretations through rulemaking needs to be rejected.

9. **CLAIM**: The use of Jones Act qualified vessels is a safety concern for workers operating on the Outer-Continental Shelf (OCS).

RESPONSE: It is important to not mischaracterize capacity issues as safety issues. Jones Act vessels fully comply with all industry and U.S. safety standards, which are some of the most stringent in the world. Moreover, safety requirements are primarily set by industry and fall under the recommendations of international set standards.

By ensuring that Jones Act qualified vessels are used for OCS operations eliminates the need for offshore vessel-to-vessel transfers. Only a Jones Act qualified ship can load merchandise shore-side and also install it on the seafloor. Delaying implementation will encourage use of foreign vessels, which to work compliantly, will require an offshore delivery and transfer from a Jones Act vessel to the foreign vessel.